No. 80-429

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
ON APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Petitioners have received a Brief in Opposition filed by respondents herein, and reply thereto as follows:

I. RECHARACTERIZATION OF THE QUESTION PRESENTED FOR REVIEW

Respondents attempt to state the question presented for review in a manner that appears more narrow than in fact is the case by referring to "intentional gender-based wage discrimination" (Brief in Opposition at i) and denying that they have asserted a comparable work concept (Brief in Opposition at 17).

Notwithstanding the respondents' assertions and the court's disclaimer (Petition App. at 17a-18a), the holding of the Ninth Circuit in this case does permit sex-based wage discrimination claims based upon a comparable work theory and any other theory that a claimant may devise. This conclusion is discussed in section II below under the heading of conflict among the courts of appeals.

For the purpose of fairly stating the scope of the question presented for review by the petitioners it is also important to examine the nature of the claim made by respondents. They have never asserted anything more than the conclusion that some portion of the difference in pay between the deputy sher-

iffs and corrections officer on the one hand and themselves on the other must be attributed to sex discrimination. Brief in Opposition at 5. Implicit in the conclusion is the further conclusion that the difference in difficulty and therefore worth of the jobs is less than the difference in pay. Respondents claim might be described as seeking "almost equal" pay for "almost comparable" work. It clearly relies upon an evaluation of the relative difficulty of unequal jobs together with the presumption that failure to pay in accordance with that evaluation consitututes a violation of Title VII.

II. CONFLICT AMONG THE COURTS OF APPEALS

Contrary to respondents' Brief in Opposition at 8-9 and 13-20, there is a conflict among the courts of appeals as to the proper interpretation of the second sentence of Section 703(h) of Title VII, 42 U.S.C. §2000e-2(h), known as the Bennett Amendment. As discussed in the petition at 11-12, the courts of appeals for the Fourth, Fifth, Eighth, Tenth and

District of Columbia Circuits have held that by virtue of the Bennett Amendment a sex-based wage discrimination claim brought under Title VII must meet the Equal Pay Act's equal pay for equal work standard. Stastny v. Southern Bell Telephone Co., 23 F.E.P. Cases 665 (4th Cir. 1980); Orr v. Frank MacNeill & Son, Inc., 511 F.2d 166 (5th Cir. 1975); cert. denied, 423 U.S. 865 (1975); DiSalvo v. Chamber of Commerce of Greater Kansas City, 568 F.2d 593 (8th Cir. 1978); Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980), cert. denied, 49 U.S.L.W. ____ (U.S. October ____, 1980); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976); cert. denied, 434 U.S. 1086 (1978). These decisions interpret the Bennett Amendment to incorporate the Equal Pay Act's equal work standard into Title VII.

In contrast, the Ninth Circuit in the instant case, 623 F.2d at 1319, and the Third Circuit in IUE v. Westinghouse Electric Corp., 23 F.E.P. Cases 588, 596 (3d Cir. 1980), petition for rehearing pending, have interpreted the Bennett

Amendment to incorporate the Equal Pay Act's affirmative defenses into Title VII, but not the Equal Pay Act's equal work standard. The conflict is clear and irreconcilable.

Respondents suggest (Brief in Opposition at 13-14) that the courts in DiSalvo, supra, Laffey, supra, Orr, supra, Ammons, supra, and the Sixth Circuit in Calage v. University of Tennessee, 544 F.2d 297 (6th Cir. 1977), have applied the equal work standard to Title VII sex-based wage discrimination claims only because the plaintiffs sought equal pay for the performance of equal work -- and that those courts would not have applied the equal work standard had plaintiffs alleged some other theory of liability. However, those courts applied the equal work standard irespective of plaintiffs' allegations because the Bennett Amendment requires plaintiffs to meet the burden of showing the performance of equal work. DiSalvo, supra, 568 F.2d at 596; Laffey, supra, 567 F.2d at 446; Orr, supra, 511 F.2d at 171; Ammons, supra, 448 F.2d at 120; Calage v. University of Tennessee, 400 F. Supp. 32, 37 (E.D. Tenn. 1975),

aff'd, 544 F.2d 297, 302 (6th Cir. 1976). The wage discrimination claims in Orr, supra, Ammons, supra and Calage, supra, were not limited to allegations concerning performance of equal work, yet the courts entered judgment against plaintiffs with respect to all of their claims for failure to meet the equal work standard.[1]

[1]In Orr, supra, the female plaintiff conceded that her job was different than those of higher paid males, but attempted to show that she had suffered discrimination with respect to pay by offering evidence, credited by the district court, that the person who set her compensation had admitted he would not pay plaintiff as much as a man. 511 F.2d at 169-70. Despite this evidence of "intentional" discrimination, the Fifth Circuit held that plaintiff had not established a claim under Title VII because she had not "sustained her burden of proving equal work." Orr, supra, 511 F.2d at 171. Similarly, in Ammons, supra, the female plaintiff alleged wage discrimination under Title VII because she purportedly had been denied a security clearance to a restricted area of the plant and, therefore, earned less pay than certain males who had received security clearances. 448 F.2d at 118-119. However, the Tenth Circuit held that "to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal work'". Id. at 120. And since plaintiff had not shown

Furthermore, respondents' argument (Brief in Opposition at 16-17) that the claim in this case is different than the claim raised in Lemons, supra, is belied by the facts herein. As noted above and like the nurses in Lemons, supra, the

(cont.)
that her job was equal to higher paid jobs performed by males, the Tenth Circuit affirmed the district court's denial of plaintiff's claim. Id. Finally, in Calage, supra, the female plaintiff did not contend that she had performed the same job as higher paid men, but rather contended that her job was of the same value to her employer as other jobs held by men listed at the same level as plaintiff's job on the employer's organization chart. 400 F.Supp. at 37. The district court in Calage dismissed plaintiff's claim due to her failure to establish a violation of the equal pay for equal work standard. Id. Although the plaintiff in Calage did not question the application of the equal work standard on appeal, the Sixth Circuit cited Orr, supra, with approval as setting forth the proper standard for adjudicating Title VII sex-based wage discrimination claims. 544 F.2d at 302. See also, Keyes v. Lenoir Rhyne College, 23 WH Cases 319 (W.D.N.C. 1976), aff'd, 552 F.2d 579 (4th Cir. 1977), cert. denied, 434 U.S. 904 (1977) (Claim based on a statistical study showing female faculty members earned less on the average than male faculty members rejected because plaintiff did not meet the equal work standard).

respondents herein seek to establish sex-based wage discrimination by comparing their jobs to different, higher-paid jobs. The nurses in Lemons, supra, sought the same pay as that accorded to jobs in other professions, allegedly because the nurse jobs were comparable in terms of education requirements, that etc., to jobs such as buyer or accountant. 620 F.2d at 229. In this case respondents intend to compare the pay levels as well as the relative difficulty of unequal jobs. Petition App. at 69a. The fact that the Tenth Circuit held that the claim in Lemons, supra, was not actionable under Title VII, and the Ninth Circuit in this case held that the claim was actionable, establishes that a conflict among the circuit courts exists over the proper interpretation of the Bennett Amendment.

Moreover, respondents' (Brief in Opposition at 17) and the Ninth Circuit's (Petition App. at 17a-18a) contentions that the Ninth Circuit's analysis of the Bennett Amendment in this case would not allow Title VII plaintiffs to assert claims of equal pay for comparable work is incorrect. Unless

the equal work limitation applies to Title VII claims and unless the two statutes are read in pari materia there would be nothing to prevent a plaintiff from asserting a wage claim based on any theory, including the so-called comparable work theory.[2] The Supplemental

[2]This point was recognized by Judge Van Dusen in his dissent in Westinghouse, supra, 23 F.E.P. cases at 600 n. 6:

> "Even if the majority's perception of this case, that it raises only the question of whether sex-based wage discrimination can be proved by way of statements of intentional wage discrimination in the absence of an equal work violation, is correct, the majority's analysis will permit sex-based wage discrimination claims to be brought solely on the basis of evidence of comparable work. By interpreting the Bennett Amendment to refer only to the four exceptions in the Equal Pay Act and by holding that Title VII need not be read in pari materia with the Equal Pay Act, the majority has necessarily decided that Title VII's prohibition against sex discrimination in wages is not limited by the Equal Pay Act's equal work requirement. Accordingly, we must confront the comparable work issue in this case.

Opinion of the Ninth Circuit in this case did not reject the statement in the initial Opinion that

> "...in a situation where primarily women are employed in a type of job that is comparable but not substantially equal to that performed by men, an employer is free under the Equal Pay Act to decrease the wages of the women solely because of their sex. Such a practice is prohibited by the plain language of §703 and will continue to be under our interpretation of the Bennett Amendment." Petition App. at 54a.

Respondents' attempt to diminish the conflict between Stastny, supra and the instant decision of the Ninth Circuit by suggesting that the Fourth Circuit was not aware of the Ninth Circuit's decision in this case. Brief in Opposition at 19-20. The plaintiff in Stastny, supra, petitioned the Fourth Circuit for rehearing alleging a conflict between the panel's decision in Stastny and the Ninth Circuit's decision in this case (as well as the Third Circuit's decision in Westinghouse, supra). The petition for rehearing was denied on September 8, 1980. Thus, the Fourth Circuit has considered the Gunther and Westinghouse

decisions, has been given an opportunity to conform its interpretation of the Bennett Amendment to that of the Third and Ninth Circuits, but has declined to change its approach. The Ninth Circuit also declined to reconsider its decision in this case. Contrary to the Brief in Opposition at 20, there is no indication that the courts of appeals will reach a common interpretation of the Bennett Amendment absent a determination by this Court of the question presented.

III. CONFLICT WITH SUPREME COURT DECISIONS

The Ninth Circuit's decision herein is in conflict with this Court's decisions. The Brief in Opposition (at 21) attempts to distinguish the Court's opinion in General Electric Co. v. Gilbert, 429 U.S. 125, 144 (1976), by suggesting that the Court's interpretation of the Bennett Amendment -- "[b]ecause of this amendment, interpretations of §6(d) of the Equal Pay Act are applicable to Title VII as well. . ." -- referred to an Equal Pay Act affirmative defense and not to the equal work stand-

ard. In General Electric, supra, the Court quoted from and relied upon an interpretative regulation (29 CFR §800.116(d) (1975)) by the Wage and Hour Administrator of the Equal Pay Act's core equal pay for equal work standard. 429 U.S. at 144. It was this interpretation of the equal work standard that the Court held was applicable to Title VII by virtue of the Bennett Amendment. There was no reference to any of the Equal Pay Act's affirmative defenses.The General Electric decision is in conflict with the Ninth Circuit's decision herein.

The Ninth Circuit's decision is also clearly in conflict with this Court's decisions concerning in pari materia statutory construction. See, United States v. United Continental Tuna Corp., 425 U.S. 164, 169 (1976); Train v. Colorado Pub. Int. Research Group, Inc., 426 U.S. 1, 24 (1976); Radzanower v. Touche, Ross & Co., 426 U.S. 148 (1976). Respondents recognize that it is improper to apply a general statute in a manner that would alter or nullify the effect of a more specific statute. Brief in Opposition at 23. But respondents have not explained why the Ninth Circuit's

construction of Title VII (the general statute) has not nullified the Equal Pay Act (the specific statute applying to wage discrimination). In fact, the Ninth Circuit has nullified the Equal Pay Act, by deciding that any plaintiff who alleges that wage discrimination is "intentional" can assert a claim under Title VII and ignore the Equal Pay Act's equal work requirement. Under that construction of Title VII, few, if any, plaintiffs would ever choose to meet the equal work standard.

This Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), does not support respondents' position. The decision in Alexander, supra, held that an employee does not waive his opportunity to proceed in federal court under Title VII by raising a claim before an arbitrator. 415 U.S. at 49. However, this Court made clear in Great American Federal Savings & Loan Assoc. v. Novotny, 442 U.S. 366, 378 (1979), that the decision in Alexander, supra, was not authority for expanding the substantive meaning of a statute. Rather, the Court held in Novotny that the critical inquiry with respect to

substantive statutory interpretation is to determine and effectuate the intent of Congress. Id. As shown in the petition at 21-22 and 25-31, the intent of Congress concerning the Equal Pay Act was to limit the involvement of the courts and the government in the wage area to the equal work situation and later to incorporate the equal work standard into Title VII as a limitation on sex-based wage discrimination claims.

IV. INCORRECT DECISION

The Ninth Circuit incorrectly decided this case. Congress devoted countless hours in hearings and deliberations over the Equal Pay Act to develop the equal pay for equal work approach. Congress considered and specifically rejected proposals that would have allowed claims for "intentional" discrimination, equal pay for jobs of equal value and equal pay for comparable work, among others.[3] The decision in this case

[3]For example, the very claim raised in Westinghouse, supra, had been advanced by the IUE before Congress during hearings over the Equal Pay Act. Hearings on H.R. 8898 and H.R. 10226

renders meaningless all of the careful deliberation over the equal work standard. Respondents suggest (Brief in Opposition at 24) that the destruction of the equal work limitation is the most compelling reason to uphold the Ninth Circuit's approach. However, respondents should address their concern to

(cont.)
before the Select Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 2d Sess., Part 1 at 175-189. In 1962, the IUE argued in favor of a bill calling for equal pay for comparable work because the Union believed such a bill would remedy the practice of separate wage scales for men and women, a practice not uncommon in industry decades ago. Id. In spite of these types of arguments, however, Congress decided not to allow the government and the courts to restructure the wage scales of employers even if there had been a history of separate wage scales for men and women. Rather, Congress chose to limit wage discrimination claims to situations where equal work had been performed. And a year later in enacting Title VII, Congress ensured that women, Blacks, etc., would have fair opportunities to obtain higher paying jobs. Thus, when the Third Circuit in Westinghouse, supra, allowed the IUE to assert under Title VII the very claim rejected by Congress during consideration of the Equal Pay Act, the Third Circuit acted contrary to express Congressional intent.

Congress and not the courts, since the enactment of the equal work limitation was a deliberate legislative act which the courts are bound to enforce.

Moreover, respondents' suggestion that incorporation of the equal work standard into Title VII would deprive women of a right (the assertion of "intentional" wage discrimination claims) that Title VII provides to minority groups is not persuasive. Brief in Opposition at 25. We know of no Title VII case that allowed any minority group member to sustain a claim of wage discrimination similar to respondents'. Historically the problem of separate wage rates has been sex related. During consideration of the Equal Pay Act and Title VII Congress was not presented with allegations concerning separate wage schedules for Catholics or Protestants, Italians or Germans, Jews or Gentiles, or Blacks or Whites. Members of minority groups had been denied access to higher paying jobs, but there was no common practice of establishing separate wage schedules for such groups as there had been for women.

Thus, the Congress was not without

reason to view wage discrimination as a sex-based problem and to address the Equal Pay Act and the Bennett Amendment to that problem. Its response was the equal work standard and there is no suggestion in the legislative history of the Equal Pay Act or Title VII that Congress believed some other standard should apply for claims of wage discrimination based on ethnic, racial or religious grounds. The fact that Congress did not consider wage discrimination concerning minority groups as a widespread problem and did not specifically address such claims is no reason to reject Congress' response to the wage discrimination problem it did consider under the Equal Pay Act and the Bennett Amendment.

In 1965 the Equal Employment Opportunity Commission adopted an interpretive regulation which petitioners contend provides that the Bennett Amendment incorporated the equal work standard into Title VII. 29 CFR §1604.7 set forth in the petition at 32-33. Petitioners noted that the EEOC modified its position in a 1972 regulation which replaced the original regulation but

showed that the more contemporaneous enactment is entitled to greater weight. Petition at 33. Respondents attempt to show that the two regulations are consistent by comparing an irrelevant provision relating to the scope of employee coverage. Respondents fail to address the pertinent language of the 1965 regulation which the Ninth Circuit has misinterpreted. Respondents Brief in Opposition at 30-32.

Additional material showing that the Ninth Circuit incorrectly interpreted the position of the EEOC prior to 1972 and partially in reliance thereon incorrectly decided this case has recently been provided to petitioners by the employer in Westinghouse, supra. A 1967 opinion letter issued by General Counsel of the Equal Employment Opportunity Commission which interprets the Bennett Amendment as incorporating the equal work standard as well as the Equal Pay Act's affirmative defenses was found a few days after the Third Circuit issued its decision in Westinghouse, supra, and was used as a basis for the petition for rehearing filed in that case. The opin-

ion letter, after quoting the Bennett Amendment, states:

> "Differentiations which are authorized under said Section are differentiations on the basis of skill, effort, responsibility and working conditions, and differentiations related to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor than sex.
>
> "It is the interpretation of these provisions that requires harmonization between Title VII and the Equal Pay amendment to the FLSA, because these are the provisions which, within the meaning of Section 703(h), 'authorize' differentiations." (emphasis added, full text set forth in the appendix hereto)

Thus, in addition to the 1965 regulation the EEOC recognized in the 1967 opinion letter that Congress intended the word "authorized" in the Bennett Amendment to incorporate the equal work standard into Title VII, as well as the affirmative defenses. Respondents' contention that the EEOC has had a "consistent" view of the Bennett Amendment is obviously incorrect.

Finally, we note that Respondents

have not argued that the issue involved herein is not important. It is obviously important as was shown in the petition at 34-38.

For the reasons stated above and in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted
Lawrence R. Derr

APPENDIX

UNITED STATES GOVERNMENT
MEMORANDUM

TO: Tom E. Robles
Director, Albuquerque RO

FROM: Kenneth F. Holbert
Acting General Counsel

DATE: June 6, 1967

SUBJECT:

Applicability of Section 800.108 of Administrators Interpretative Bulletin on Equal Pay for Equal Work, Part 800 to Proceedings under Title VII of the Civil Righst Act of 1964 in Light of the Commission Guidelines on Sex Discrimination, Part 1604 Commission Procedural Regulations, Section 1604.7.

The following question has been raised before your office: A privately-owned public utility operating within your region has multiple offices. A charge of discrimination has been filed by a female employee operating in one office building in a large city. The basis of the charge is that she is paid less for performing similar work to that

performed by male employees because of her sex. The male employees with whom she is being compared are employed in a separate building which is located approximately two miles away from the site of the employment of the Charging Party. Under the above-cited Interpretative Bulletin of the Administrator, Wage and Hour Division, as explained in the Administrative Opinion of the Administrator of June 17, 1966, (BNA, FEP 401:739), and as applied by the Administrator in similar situations, the male employees are located in a separate establishment from the female employee within the meaning of the Equal Pay provision of the Fair Labor Standards Act. Therefore, no comparison of the wages of said male and female employees may be made for the purposes of determining a violation of the Equal Pay provisions of the FLSA.

You raise the question whether the concept of "establishment" and related administrative interpretations and opinions under the Equal Pay provisions of the FLSA constitute "relevant interpretations" within the meaning of Section 1604.7 of the Procedural Regula-

tions of the Commission, so that the Commission is bound by said opinions and interpretations.

It is concluded that Section 800.108 of the Interpretative Bulletin of the Administrator and opinions issued thereunder do not constitute "relevant interpretations" within the meaning of the Commission Procedural Regulations cited above, and that in processing cases alleging discrimination in pay based on sex, the Commission is not restricted to a comparison of rates in the same "establishment" of a multi-establishment employer.

The "relevant interpretations" of the Equal Pay Act to which the Commission regulations speak are those dealing with the measurement process in determining whether there is equal pay for equal work, within the area in which the FLSA and the provisions of Title VII overlap. This means that in situations to which both statutes are applicable, the same standards and rules shall be applied to determine whether there is "equal pay for equal work". However, as Section 1604.7 of our Procedural Regulations suggests, the regulation was not

intended to restrict the coverage of Title VII to those situtations where the FLSA is not applicable. The Equal pay provisions of the FLSA are applicable only within the limits of an establishment as that term is used in the statute, and as it has been interpreted. The concept of an "establishment" is foreign to Title VII. Title VII contains no such limitation unless it is found in Section 703(h) which provides:

> It shall not be an unlawful employment practice under this Title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the FLSA of 1938 as amended.

Differentations which are authorized under said Section are differentiations on the basis of skill, effort, responsibility and working conditions, and differentiations related to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor that sex.

It is the interpretation of these

provisions that requires harmonization between Title VII and the Equal Pay amendment to the FLSA, because these are the provisions which, within the meaning of Section 703(h), "authorize" differentiations. The Equal Pay amendment does not authorize sex discrimination between employees in different establishments, wihin the meaning of Section 703(h).

It simply does not deal with such discrimination. No affirmative Congressional intent to authorize discrimination on the basis of sex between employees in different establishments may be read into Section 703(h), or into Section 1604.7 of the Procedural Regulations of the Commission. Accordingly, the concept of "establishment" and its interpretations and limitations are not applicable to proceedings under Title VII.